

IN THE
Supreme Court of the United States

OCTOBER TERM, 1921.

No. 207.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
Appellant.

vs.

UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

APPELLANT'S BRIEF IN REPLY.

While the brief for the Government in the instant case has, in the main, been anticipated by our brief already on file, there are some matters which seem to require a reply.

I.

The entire argument of the Government respecting the tax liability of appellant proceeds upon the fundamental fallacy that a statute imposing a tax under certain definitely stated specific conditions is, neverthe-

less, a tax imposed generally and without regard to these specific conditions. The statute in question imposes a tax upon bankers *using or employing a capital*, but the argument of the Government, as well as the decision of the Court of Claims, proceeds upon the theory that the tax is imposed upon any corporation engaged, among other businesses, in some of the activities defined by the statute as banking, whether its capital is actually used in these activities or not.

The argument, as well as the decision, is based upon the preceding decision of the Court of Claims in *Union Trust Co. v. United States*, cited at pages 9 and 44 of the Government's brief. In that case the Court of Claims said:

"But if he does the business of a banker he is taxed on the amount of the capital which he uses or employs in his business of which that of banking may be but a part. It is the one person or firm or company or bank which is taxed and the capital used or employed can be ascertained * * * The act fixes a tax upon the banker using or employing a capital. The two words are not to be accorded the same meaning. Using a certain capital implies its being made use of, while employing a certain capital does not mean an actual use of it but rather the having it available for use when and as needed when desirable."

We submit, on the contrary, that the two words "using" or "employing" do mean substantially the same thing. They are both words implying action. One of the definitions given by the dictionaries (for example, Webster) of the verb "use" is "to employ." And one of the definitions of the verb "employ" is "to use." In popular understanding the two words are

synonymous and interchangeable and express substantially the same meaning. The Anger Head, 46 Fed. Rep., 664. The Court could have said with equal plausibility that "employing" a certain capital implies its being employed, while "using" a certain capital does not mean the actual employment of it but rather the having it available for use or employment when and as needed or desirable. The use of two or more synonymous words in a statute is not at all infrequent, though the statute would mean the same if only one of the words were used. The contention of the Government and the decision of the Court of Claims, is completely answered, as we think, by the Circuit Court of Appeals in *Treat v. Farmers Loan & Trust Co.*, 185 Fed., 760, 762, where the only banking business done by the company was precisely the things which were done by the appellant here, in the following language:

"This business is done entirely by means of the depositors' money. As the act only taxes the capital used or employed in banking we think the Circuit Judge was entirely right in holding as a matter of law that the plaintiffs not using their capital or surplus in banking were not subject to the payment of any tax thereon."

It will be observed that the Court treats the words "using or employing" as meaning the same thing, since it is said "that the plaintiffs not *using* their capital" were not subject to a tax. The Court proceeds:

"No doubt they got credit by the amount of their capital and surplus, but Congress evidently intended to put corporations on the same basis as

individuals, and it would be obviously very unfair to tax an individual upon his whole fortune because he was *using* part of it in a banking business."

Nevertheless, in the case of an individual, as in the case of a corporation, his whole wealth is *available* for use, and his whole wealth may be called upon to answer for any liability which he incurs in the banking business. If Congress had intended to tax capital or surplus, irrespective of its *actual use*, it would have been easy to say so, as it did say in the Act of 1866, referred to in our original brief.

The vice of the decision of the Court of Claims is that while the law, in plain terms, makes the tax depend upon an actual use or employment of capital or surplus, the Court makes it depend upon the ownership or possession merely. We think it is safe to say that none of the cases cited by us or by the Government, is authority for that conclusion. Even the case of *Anderson v. Farmers Loan & Trust Co.* (241 Fed., 322), which is the main dependence of the Government, does not question the interpretation of the statute made in the Treat case; indeed, both decisions were rendered by the same Court, Circuit Judges Coxe and Ward sitting in both cases. The Anderson case is distinguished from the Treat case, and the rule of law laid down in the latter held not applicable to the facts in the former. The facts, however, in the Treat case are substantially identical with the facts found by the Court of Claims in the instant case, the only difference being that in the Treat case the facts were agreed upon, and in the instant case the facts were found by the Court.

In the Treat case it appeared :

1. That the capital and surplus were *permanently* invested in stocks and bonds.

2. That the only banking business done was the opening of credits by deposits or collections of money, and paying the same out on check, draft or order, and the loaning of money on stocks, bonds or secured paper.

3. This business was done entirely by means of the depositor's moneys.

In the instant case the Court of Claims found (1) that the money derived from the sale of capital stock and the money of the surplus fund were *permanently* invested in real estate, bonds, etc.; (2) the only banking business which the company did was to receive money on deposit from those whom it insured or bonded, which was deposited with the banking department, open credits by the deposit of money or currency subject to payment upon draft, check or order, and loan money to customers on notes secured by stocks and bonds (Finding V). From these and other findings it follows, as a necessary conclusion, pointed out in our original brief, that (3) only the depositors' money was used in carrying on this limited banking business.

It is difficult to imagine two different cases more nearly alike in all essential particulars.

It is significant in this connection that it is the Government's contention that the "surplus and capital were *employed* [not used] in the banking business *as a basis thereof.*" (Our italics.) Government's brief, page 3.

At page 9, it is urged that appellants "capital was as much *available* for banking as any other of its de-

partments, and just as *available for use when needed or desired*," and, citing *Union Trust Co. of Indianapolis v. United States*, 55 Court of Claims, 424, as authority, the brief continues:

"The employing of capital does not necessarily mean an actual use of it, but rather the having it available to use when and as needed or desirable."

Perhaps the fallacy of this statement has already been sufficiently demonstrated. It would seem to be obvious that being available for use or employment and actual use or employment are two entirely different things. In this connection we call especial attention not only to the Treat case, just cited, but to the more recent decision of the Circuit Court of Appeals for the Third Circuit, in *Real Estate Title, Insurance and Trust Co. vs. Lederer*, 263 Fed. Rep., 667, 669. The Court referring to a similar contention to that presented here, said:

"Of course, these permanent investments formed part of the assets of the company as a whole, and, in case the company's banking operations proved unsuccessful, those assets would eventually have to contribute toward making up the losses of the depositors. But this fact of ultimate responsibility of all the company's assets for all of the company's liabilities did not, in our judgment constitute of itself a use or employment of those securities in the banking business for the taxing year. No such losses had occurred, and no such use or employment of its assets in other departments was made by the company in its banking operations."

The distinction between use and availability for use is well illustrated by four cases involving a tax on the use of foreign built yachts (36 Stat., 112) *Billings v. United States*, 232 U. S., 261; *Pierce v. United States*, 232 U. S. 290; *United States v. Goelet*, 232 U. S., 293; *United States v. Bennett*, 232 U. S., 299.

Mr. Justice White, speaking for the Court in all four cases, pointed out that the thing taxed was not ownership but the election of the owner to take advantage of one of the elements of ownership, the right to use, which was taxed. 232 U. S. 280. The opinion then proceeds to distinguish between that passive significance of "use," which means the mere privilege to use, and its active significance, which was the sense intended by the taxing act, that implies the actual exercise of such privilege.

" * * * the privilege of use is purely passive, (or subjective)—a right which necessarily pertains to ownership and must exist where there is ownership as one may not obtain ownership without acquiring the privileges of use which ownership gives. The other, on the contrary, that is, use in the statutory sense, although it arises from ownership, is active (objective); that is, it is the outward and distinct exercise of a right which ownership confers but which would not necessarily be exerted by the mere fact of ownership." 232 U. S., 281.

This distinction, which was stated to be "fundamental" (p. 281), was given practical application in the second case cited. The owner of a foreign built yacht was held not liable to the tax because " * * * the yacht was not in use * * * during the year * * * but was out of commission and laid up unused * * * throughout the whole of such year." *Pierce v. United States*, 232 U. S., 290, 291.

At page 8 of the Government's brief it is stated that claimant made no protest in payment of these taxes and that the claimant has conceded that less than one-half of its capital and surplus or some portion of its capital had been used or employed in the banking business.

This Court has repeatedly decided that where a suit is brought under a Refunding Act, protest is unnecessary as shown in our original brief (*Hvoslef vs. United States*, 237 U. S., page 1).

The Court's attention, however, is called to Volume 2, of the decisions of the Commissioner of Internal Revenue, page 17, Treasury Decision No. 21,421 of July 15, 1899, wherein it appears that this Company distinctly challenged the authority of the Commissioner of Internal Revenue to impose this tax.

There is nothing in the record to indicate that claimant ever conceded that any portion of its capital or surplus was used or employed in the business of banking.

II.

We are under the always disagreeable duty of pointing out to the Court a number of misstatements to be found in the Government's brief. They are, of course, inadvertent but none the less injurious, if not corrected in the mind of the Court.

1. At page 3, in stating the Government's contentions, it is asserted that the deposits were *permanently* invested in stocks, bonds, etc. And again at page 19, it is said, "Appellants invested the deposits as *permanently* as it did its capital stock fund." Both statements are entirely without warrant. Again at page 20 these investments are referred to a number of times, as *permanent*. The Court found in the case of

the *capital stock and surplus* that the funds were *permanently invested*. (Finding IV.) But in the case of the *deposits* it found simply that they were invested (Finding VI). And it is perfectly apparent that this investment was of a temporary character since the deposits so invested were subject at any time to be withdrawn upon the checks, drafts and orders of the depositors.

2. At page 3, of the brief it is contended that these deposits were used as, and became a part of the capital. There is no foundation for this statement in any finding of the Court. If it is stated, not as a fact but as a conclusion of law, it is contrary to the decision of this Court, as well as the decisions of other Courts. In *Bailey v. Clark*, 21 Wall., 84, this Court defined the word "capital" when used with respect to a corporation or association, as applying "only to the property or means contributed by the stockholders as the fund or basis for the business enterprise for which the corporation or association was formed."

On the same page it is stated that "the profits from its banking business amounted to over \$570,000 in the four years." The Court below found as a fact that the net income (or profits) derived from the banking business for the four years was \$275,060.82. The Government has confused "income" with "profits" in its statement.

On the same page it is also stated that:

"Part of the bank's profits were carried as counter cash and the balance deposited in the company's various depositories."

Again the confusion of the two terms "profits" and "income." The Court actually found, Finding VII, at p. 22:

“A part of the income from each department was maintained as cash and remained uninvested, part of the money being carried by the respective departments as counter cash and the balance being deposited in the company’s various depositaries.”

3. At page 6 of the brief, it is stated that “*a part of the money received on deposit was invested.*” While this is not especially important, we call attention in passing to the fact that the Court of Claims simply found that *the money* received from deposits was invested, and so on.

4. On the same page it is said that the interest or income derived from the securities representing the deposits was utilized, first, to pay interest upon the deposits, and the balance was, *like plaintiff’s other income*, carried into the profits and loss or undivided profits account. This statement is misleading because the finding of the Court is not that the *balance*, but that the *earnings*, were carried into the undivided profits account at the end of the year, *after the expenses of that department had been paid and charged upon its separate accounts.*

5. On the same page it is stated that securities representing the investment of *much of* plaintiff’s capital assets were kept in separate packages, etc. What the Court found was that the capital stock and surplus funds were permanently invested, etc., and that *these investments* (not much of them) were kept in separate packages marked as stated.

6. At the bottom of page 6, it is stated, “In this account (Capital stock account) there was included plaintiff’s capital, surplus, undivided profits, premium reserves, net profits, etc.”

Finding IV is the only finding that states what was

included in the capital stock department. From that finding it appears that only the *capital stock* and the *surplus fund*, both represented by investments, were carried in the Capital Stock Department or account.

7. At page 7, it is stated that the expenses incident to the conduct of the banking business were paid out of the undivided profits in the same manner in which its other operating expenses were paid. While there may be some warrant for this statement in the Third Finding of the Court of Claims it is in flat contradiction of Findings VI and VII, where it is expressly found that (a) the business of the banking department was kept separate from the other business, etc., and that (b) the expenses were paid out of the earnings before they were carried to the undivided profits account.

8. At page 9 it is said:

“* * * the fact that the plaintiff kept separate packages of securities in separate compartments of its vault and marked each package as heretofore indicated, would not determine, and is not proof that one bundle of securities represented capital any more than the other; * * *”

This statement is particularly misleading because it assumes that all the plaintiff did was to keep separate packages of securities, as stated, whereas the Court expressly found that the capital and surplus were permanently invested in these securities. In other words, appellant is not put to the necessity of relying upon an inference to be drawn from the mere keeping of certain packages of securities separate and apart that the capital and surplus were invested in these securities, but its claim to that effect is based upon the *posi-*

tive finding of the Court which the Government here is not at liberty to dispute.

The facts are utterly unlike those presented in *Anderson v. Farmers Loan & Trust Co.*, *supra*, relied upon by the Government. There the Trust Company simply held investments to an amount exceeding the capital, etc., and the Court said:

“We do not think that the possession of securities of a value exceeding the capital, surplus and undivided profits is proof that no part of the capital, surplus and undivided profits is used or employed in banking.”

Here, however, the *fact* is established that from the beginning the capital and surplus were actually embodied in these investments.

9. The Government admits on page 24 of its brief “If the capital is prorated among the different branches of its business in accordance with the profits of that branch as compared with all the branches, taking the net assets as the basis of the capital the claimant would be dealt with justly and the spirit of the law would be carried out.”

The Government further states “that this cannot be done in this case because the appellants have not furnished the evidence for making this computation.”

This is an erroneous statement (see appellant's motion to remand, pp. 3, 22-24).

10. At page 30, in an attempt to distinguish the Treat case from the instant case, it is said that “in the instant case the lower court found that they (that is the capital and surplus) were employed in banking.” Of course, as we have pointed out again and again, the lower Court made no such finding, but on the contrary,

found that they were permanently invested in real estate, bonds, etc., and all operations relating thereto were kept wholly separate and distinct from the operations of the banking department.

11. At page 35, attention is called to the fact that the Court in the Treat case said that "plaintiff is not a bank or banker but does some of the things enumerated in the section as indicative of such business." And attempting to distinguish the instant case, counsel says: "In the case at bar appellant is a banker handling millions in the banking business."

In the face of the findings of the Court below it is somewhat difficult to find an excuse for this statement. In the instant case appellant is primarily a surety company, as in the Treat case the plaintiff was primarily a trust company. The Government itself concedes that "the surety business was plaintiff's chief business." (Government's brief, page 5.) It was not a banker in the commercial sense of that term. *Mercantile National Bank of New York v. Mayor, etc., of N. Y.*, 121 U. S., 138, 159. It simply did some of the things (precisely the same things, no more and no less), that were done by the plaintiff in the Treat case which brought it within the definition of the Taxing Act.

III. LIMITATIONS.

The Government contends that the action is barred by the Statute of Limitations. This defense has been repeatedly asserted by the Government in the Court of Claims and in this Court in actions for the refund of taxes under Refunding Acts.

In the instant case the Government demurred to the

original petition filed in the Court of Claims which demurrer was overruled without prejudice. 54th Court of Claims, page 43.

The Court of Claims there followed the decision of this Court in the Hvoslef case, 237 U. S., page 1, saying:

“The same rule must obtain as to all claims described in the Act of 1912 *and in this view we are not concerned in the principal case with the questions arising under the general provisions of the Internal Revenue Laws.*”

The same question was later considered in the Sage case, 250 U. S., 33 (decided May 19, 1919), where the Court said: “The Act of 1912, like that of 1902 created rights where they had not existed before (*U. S. vs. Hvoslef*, 237 U. S., page 1) and the claimant’s rights are not barred.”

In the Sage case this Court said “The Act of ¹⁹¹²~~1921~~ applies in terms to all claims for the refunding of any Internal Tax alleged to have been erroneously or illegally assessed and collected * * * the only condition was it should have been presented not later than January 1, 1914. Until that time no Statute of Limitations could begin to run. * * * This suit was brought on January 23, 1917, and so was within the six years allowed by Rev. St. §1069 * * * for suits in the Court of Claims.”

See also *Uterhart vs. United States*, 240 U. S., 598.

In the case of *Kahn, et al., Executors, vs. United States*, No. 52, October Term, 1921, reported in advance sheets of January 1, 1922, although the Court below held the action barred by the Statute of Limitations, the Court decided the case upon its merits.

The Court’s attention is also called to the case of

Henry, Executor, vs. United States, 251 U. S., 393, which was dismissed by the Court of Claims as barred by the Statute of Limitations.

In this Court the Government admitted the judgment could not be sustained on that ground but it was affirmed on other grounds.

In the case of *Tiffany, Executor, vs. United States*, the action had been dismissed by the Court of Claims as barred by the Statute of Limitations.

In this Court the Government confessed error, 252 U. S., 590, 55th Court of Claims, 519 and 534.

On page 62 of its brief, the Government also contends that Chapter 140, Act approved March 4, 1915, 38 Stat., 996 bars this case, said Act providing "nor shall said Court of Claims have jurisdiction of any claim which is *now barred* by the provisions of any Law of the United States."

Inasmuch as the Statute of Limitations would not run against the claim until January 1, 1920, it is difficult to understand why counsel for the Government should cite this provision.

Respectfully submitted,

SIMON LYON,
R. B. H. LYON,
Attorneys for Appellant.

GEORGE SUTHERLAND,
Of Counsel.

SUPREME COURT OF THE DISTRICT OF COLUMBIA

IN THE COURT OF CLAIMS

FOR THE DISTRICT OF COLUMBIA

THE COURT OF CLAIMS

APPEAL FROM THE COURT OF CLAIMS

**MOTION TO REMAND TO THE COURT OF
CLAIMS FOR FURTHER FINDING OF FACTS**

**JOHN L. LEE,
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Attorneys for Appellants**

**GEORGE SUTHERLAND,
of Counsel**

TABLE OF CONTENTS.

	Page
Motion to remand to Court of Claims.....	1
Brief on Motion	5
Affidavit supporting motion	7
Exhibit "A," Appellant's request for findings of fact, statement and brief in the Court of Claims	8
Exhibit "B," statement of profits as surety Com- pany, filed in Court of Claims.....	22
Exhibit "C," motion of new trial.....	25
Exhibit "D," supplemental motion for new trial, filed in Court of Claims.....	26
Affidavit of Counsel	32

CITATIONS.

Real Estate Title Insurance & Trust Company vs Lederer, Collector, 229 Fed. Rep., 299, 263 Fed. Rep., 667	5-18
Ripley vs. United States, 220 U. S., 491.....	5
Title Guarantee & Trust Company vs. Miles, Col- lector, 258 Fed. Rep., 771.....	19
Treat, Collector, vs. Farmers Loan & Trust Com- pany, 185 Fed. Rep., 760.....	18
United States vs. Adams, 9 Wallace, 661.....	5
United States vs. Archer, 241 U. S., 119.....	5



IN THE
Supreme Court of the United States

OCTOBER TERM, 1921.

No. 207.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

VS.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

MOTION TO REMAND TO THE COURT OF
CLAIMS FOR FURTHER FINDING OF FACTS.

The appellant, the Fidelity & Deposit Company, of Maryland, by its attorneys respectfully represents unto this honorable court:—

I. That this cause involves the construction and application of Act of Congress approved the 13th day of June, 1898 (30 Stats. 448), Section 2 of which imposed a tax upon capital used or employed by bankers. The above Act was repealed by the Act of April 12, 1902 to take effect July 1, 1902. (32 Stats. 96, 97.) The cause

also involves the construction of the Act of July 27, 1912, (30 Stats. 240), which act was entitled "An Act extending the Time for the Re-payment of Certain War Revenue Taxes erroneously collected."

II. The tax upon bankers was an excise tax the amount of which was determined by the amount of capital or surplus used or employed in their banking business. The undisputed evidence in the court below disclosed the fact that the limited banking business of the corporation made no use or employment of the company's capital or surplus. The record in the Court of Claims discloses the fact that the capital and surplus of the Fidelity & Deposit Company of Maryland was invested in securities and real estate which was used in the conduct of the bonding business which was the main purpose for which the company was organized. The record further discloses that the banking department of the company was relatively small in comparison with the bonding business and that the funds employed in the banking department were only the funds held on deposit and that no part of the appellant's capital or surplus was in any manner used or employed in the banking department. The banking department occupied a part of the building in which part of the capital of the company was invested, but the banking department paid the surety department rental therefor. The banking department showed a profit during the years in question arising solely from the use of the depositors' money after paying all expenses including rental for its banking space and without the use of any of the capital or surplus of the company.

III. The appellant requested the Court of Claims in its VI Request for Findings of Fact to find that no

part of its capital or surplus was used or employed in its banking business as will appear from Appellant's Requests for Findings of Fact attached hereto as Appellant's Exhibit "A." The Court of Claims, however, made no distinct finding as to whether or not the capital or surplus of the appellant company was used or employed in its banking business.

IV. The Court of Claims found in Finding V, page 21, of the transcript of the record filed in this Court the amount of the deposits in the banking department for each year in question, and the amount of the net income realized by the banking department for the years in question. In the Court's finding below, however, it omitted to find for the purpose of comparison of the surety department with the banking department the amount of net income derived from the surety department, although statements showing such net income of the surety or bonding department was contained in the record and undisputed, as will be seen from a statement of profits of that department attached hereto and marked Appellant's Exhibit "B."

The court below was also requested to find the net income of the surety department by the appellant's supplemental motion for a new trial, which motion was overruled. The motion for a new trial and supplemental motion are attached hereto and marked Appellant's Exhibit "C" and "D."

WHEREFORE, the appellant moves this Court to remand the cause to the Court of Claims with directions to find from the evidence now in its record:—

First:—Whether or not the banking department used only the funds of its depositors in the conduct of the business of that department.

Second:—Whether or not any of the capital or sur-

plus of the company was actually used or employed in the banking business, and, if so, what amount.

Third:—What was the net income of the appellant's surety or bonding department during each of the years in question.

SIMON LYON,
R. B. H. LYON,
Attorneys for Appellant.

GEORGE SUTHERLAND,
of Counsel.

BRIEF ON THE FOREGOING MOTION.

A motion of this character is a proper motion. *United States vs. Adams*, 9 Wallace, 661; *Ripley vs. United States*, 220 U. S. 491; *United States vs. Archer*, 241 U. S. 119; *Maryland Casualty Company vs. United States*, No. 73, October Term, 1919.

The facts upon which this motion are based are sufficiently set forth therein. It was the undisputed testimony in this case that the only funds that the banking department actually used or employed in its banking business were the funds of its depositors held on deposit and that no part of the capital or surplus of the company was used or employed in the banking department. The Court, however, has not so found and until such findings have been made or the negative thereof a proper decision cannot be reached in this case.

If, however, the Court should determine that a portion of the capital had been used or employed in the banking department there is no method of arriving at the amount so used or employed without additional findings. The net income or earnings of each department should be found for purposes of comparison. See, for example, *Real Estate Title & Insurance Co. v. Lederer*, 263 Fed. Rep., 667, 669. In the instant case, the Court found the net income of the banking department, but failed to find the net income of the surety department. We are, therefore, asking that for purposes of comparison of the two departments the net income of both be found. We do not, however, concede that this indicates that any of the capital or surplus of the company was used or employed in the banking department.

We respectfully submit that until the additional findings requested have been made that a proper judgment cannot be rendered in this case.

Respectfully submitted,

SIMON LYON,

R. B. H. LYON,

Attorneys for Appellant.

GEORGE SUTHERLAND,
Of Counsel.

AFFIDAVIT OF COUNSEL.

District of Columbia, ss:

Simon Lyon being duly sworn deposes and says that he is one of the attorneys for the appellant in the above entitled cause, No. 207, of the October term, 1921; that he is familiar with the record thereof in the Court of Claims and in this Court; that he helped to prepare and has read the foregoing motion; that he believes the facts therein set forth to be true; that in his opinion the facts set forth in the findings of the Court of Claims are insufficient for this Court to pass properly upon the claim in dispute; that the findings of fact are insufficient in not including therein

1. Whether or not the banking department used the funds of its depositors only, as the funds for the operation of that department.

2. Whether or not any of the capital or surplus of the company was used or employed in the banking business and, if so, what amount.

3. What was the net income of the appellant's surety or bonding department during each of the years in question? That without such findings this Court can not properly pass upon the issues submitted to it.

SIMON LYON.

Subscribed and sworn to before me this 14th day of December, 1921.

GEORGE W. SMITH,
Notary Public.

(Seal)

EXHIBIT "A,"
IN THE
UNITED STATES COURT OF CLAIMS.

No. 33,796.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
vs.
THE UNITED STATES.

PLAINTIFF'S REQUEST FOR FINDINGS OF
FACT, STATEMENT AND BRIEF.

STATEMENT OF CASE.

This is a suit to recover \$8,300 unlawfully collected from plaintiff by the Collector of Internal Revenue as special bankers' taxes during the period July 1, 1898-June 30, 1902, under Section 2 of the War Revenue Act of June 13, 1898 (30 Stat., 448).

Under this act a "special tax" at graduated rates was imposed upon "bankers using or employing a capital" of certain amounts, bankers being defined as those "having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, cheque or order, or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange or promissory notes, or where stocks, bonds, bullion, bills of exchange or promissory notes are received for discount or sale."

Plaintiff is a corporation of the State of Maryland, having been incorporated in 1890 as a trust and deposit company under the name of "Fidelity Loan & Trust Company of Baltimore City." About a month later the name of the company was changed by special legislative act to "The Fidelity and Deposit Company of Maryland" and the company was thereupon authorized to conduct what is commonly known as a "general surety and bonding business." The company, under the powers thus conferred, operated several distinct departments, the principal business transacted being that conducted by its surety bond branch, known as the "Capital Stock Department." It also operated a "Banking Department" where money was received from depositors subject to repayment upon cheque, draft or order, and where money was advanced or loaned to customers on the security of stocks and bonds. The only classes of business enumerated in Section 2 of the Taxing Act which the Company transacted were those above mentioned, viz., the receipt of deposits and the making of loans on stocks and bonds and these were conducted exclusively by the Banking Department. Practically from the beginning, the Company has kept its surety bond, and related businesses, separate and distinct from its banking operations, not only as a bookkeeping and accounting proposition, but as a physical fact—in its documents, data, and details. At the time in question, the surety bond business of plaintiff had assumed large proportions, the premiums alone, on the bonds executed, amounting to about a million dollars a year. The earnings of this department were about twenty times as great as the earnings from the banking department. During the period in question, the average capital

stock outstanding was \$1,500,000, the average surplus \$1,812,500. The money derived from the sale of capital stock and the money of the surplus fund has always been kept separate from the money used by and in the banking department—the former being permanently invested in securities which were earmarked as belonging to the Capital Stock Department and kept separate from the earmarked securities of the banking department in which money of the latter department was invested.

The Banking Department maintained a separate organization. Both as a matter of bookkeeping and in its actual operations, the business of this department was kept separate and distinct from all other businesses conducted by the company. The company consistently treated itself as a trustee for depositors in its Banking Department and has scrupulously kept the money thus received on deposit entirely separate from its other moneys. The investments made by this department, all of its banking business in fact was conducted solely on the depositors' money.

Though none of the capital or surplus of plaintiff was used or employed in the banking business which plaintiff transacted, the Internal Revenue officers assessed and collected from plaintiff during the period in question the sum of \$8,300 as a special banker's tax, computed at the prescribed rate upon plaintiff's capital stock. The tax assessed and collected for the fiscal year ending June 30, 1898, was based, however, upon merely a nominal capital of \$25,000.

Under the authority of the refunding act of 1912, a claim for refund was duly filed by plaintiff on the prescribed Treasury form No. 46, on November 22, 1913. The claim was rejected on April 19, 1917.

REQUEST FOR FINDINGS OF FACT.

The plaintiff, considering the facts as hereinafter set forth to be proven and deeming them material to the due presentation of this case, requests the court to find the same as follows:

I.

The Fidelity and Deposit Company of Maryland is a corporation duly organized and existing under and by virtue of the laws of the State of Maryland with its principal offices in Baltimore, Maryland. It was incorporated in February, 1890, under article 23 of the Code of Public Laws of Maryland, its charter being amended at different times thereafter by special acts of the legislature of that State. True copies of the general laws, charter, and special acts referred to are incorporated in plaintiff's petition, a copy of which is attached to and made a part of these findings.

II.

Plaintiff, as its name indicates, is and was at the times involved in these transactions a bonding and surety company, its principal business being that of acting as surety for the fidelity and faithful performance of persons holding places of trust or responsibility, public or private, or bound by any duty or contract. Plaintiff also executed bail bonds and recognizances and acted as trustee under deeds of trust for mortgage bond issues (Q. 4, 30; Q. 29, R. 32; Qs. 74-79, R. 37; Qs. 106-117, R. 40; Qs. 151-156, R. 44).

Continually since its organization plaintiff has maintained a separate and distinct department and organi-

zation for the transaction of that part of its business just above described (Qs. 39-40, 44-47, R. 33; Q. 53, R. 34).

III.

The capital stock and surplus accounts of plaintiff company during the period in question were as follows:

	<i>Capital</i>	<i>Surplus.</i>
For the year ending:		
June 30, 1898	\$1,000,000	\$1,000,000
1899	1,500,000	1,850,000
1900	1,500,000	1,850,000
1901	2,000,000	2,550,000
(Qs. 5-10, R. 30; Qs. 17-24, R. 31.)		

IV.

The money derived from the sale of capital stock and the money of the surplus fund were never commingled with the total assets of the company, but were permanently invested in real estate, bonds, stocks and some few other securities and employed solely in conducting its surety and bonding business, which was called by plaintiff and designated on its books as the "Capital Stock Department." The investments of the assets of this department, the capital stock money and surplus, were designated "Capital Stock Investments" and all the operations of the department were recorded in distinct and separate accounts on the books of the company, known as the "Capital Stock Account," and kept separate and distinct from the records of all other business transacted by the Company. The investments of the Capital Stock Department were kept alone in a separate compartment in the company's vault, in envelopes earmarked "C-S" (Qs. 30-55, R.

32; Qs. 74-79, R. 37; Qs. 104-117, R. 40; Qs. 143-147, R. 44; Qs. 151-156, R. 44) (Qs. 14-23, R. 57; Qs. 30-32, R. 58; Qs. 50-55, R. 60; Qs. 62-73, R. 61; Qs. 86-88, R. 62).

The income of the Capital Stock Department consisted principally and almost exclusively of premiums earned on bonds executed by the company which, during the period in question, were as follows:

For the year ending:

Dec. 31, 1897	\$645,908.67
1898	858,975.71
1899	976,894.47
1900	1,135,321.65
1901	1,211,588.61

(Qs. 192-202, R. 48.)

V.

The plaintiff also maintained and operated another separate and distinct department and organization which conducted the so-called banking business of the company. This department occupied branch offices of the company. For further security, the company received money on deposit from those whom it insured or bonded and these funds were deposited with the banking department. Credits were also opened by the deposit of money or currency subject to be remitted or paid upon draft, check or order, and the banking department advanced or loaned money to its customers on notes secured or supported by stocks and bonds, but not by bullion, bills of exchange or promissory notes. It did not receive either for discount or sale any stocks, bonds, bullion, bills of exchange or promissory notes and in fact did not deal at all in commercial paper. The money received on deposit as aforesaid, during the period in question was as follows:

For the year ending:

June 30, 1898	\$2,632,625.66
1899	3,173,017.39
1900	3,739,275.47
1901	4,139,675.55

The following sums derived from the investment of these deposits were returned to the depositors as interest:

For the year ending:

Dec. 31, 1898	\$49,291.88
1899	76,255.11
1900	84,191.18
1901	86,788.78

leaving a net income derived from this business as follows:

For the year ending:

Dec. 31, 1898	\$43,607.64
1899	60,325.23
1900	78,275.29
1901	92,852.56

This department also maintained safe deposit vaults for customers and derived a relatively insignificant income from the rental of its safe deposit boxes. These rentals in 1898 amounted to \$3,928.50. (Qs. 55-80, R. 35; Qs. 94-129, R. 39; Qs. 180-184, R. 47; Qs. 193-199, R. 49; Qs. 25-32, R. 58; Qs. 41-55, R. 59; Qs. 63-68, R. 61).

VI.

The business of the banking department was kept entirely separate and distinct and segregated from all other business conducted by plaintiff. The money received from deposits was invested in stocks and bonds

which were kept in separate envelopes in separate compartments of the company's vaults and earmarked "I.D." or "E.D.," respectively, according as they represented general individual deposits or deposits called "Estate Deposits" made by those bonded or insured by the company. The assets of the banking department were not employed in the transaction of any of the businesses conducted by the Capital Stock Department, and the records of the business of the banking department were kept in separate books as accounts separate and distinct from the accounts of the Capital Stock Department. The entire business of the banking department was conducted solely on its depositors' money. Neither the capital stock nor surplus of plaintiff company was used or employed by or in the banking department. (See citations under V, above.)

VII.

Earnings from the two separate departments were carried to the undivided profits account of the company at the end of each year, after the expenses of each department had been paid and charged to the appropriate department upon the separate accounts of that department out of the earnings of that department. A part of the income from each department was maintained as cash and remained uninvested, part of the money being carried by the respective departments as counter cash and the balance being deposited in the company's various depositories. The money so deposited was not segregated according to the source from which it came, though the source of the items comprising its total amount was recorded in the respective books of each department (Qs. 185-188, R. 48; Qs. 213, 268, R. 51; Qs. 55-61, R. 60).

VIII.

In each of the years in question plaintiff was required by and thereupon regularly and duly made to the Commissioner of Internal Revenue a return of its capital and surplus upon which defendants' duly authorized revenue officers assessed against and collected from plaintiff the total sum of \$8,300 as special bankers' taxes under Section 2 of the Act of June 13, 1898, as follows:

For the fiscal year ending June 30, 1898, twenty-five thousand dollars (\$25,000) at two dollars per thousand	\$50.00
For the year ending June 30, 1899, one million one hundred twenty-five thou- sand dollars (\$1,125,000)	2,250.00
For the year ending June 30, 1900, one million five hundred thousand dollars (\$1,500,000)	3,000.00
For the year ending June 30, 1901, one million five hundred thousand dollars (\$1,500,000)	3,000.00
Total tax on capital	<u>\$8,300.00</u>

The sums so collected were duly and regularly reported by said officers and covered into the Treasury of the United States.

IX.

Under authority of the Act of July 27, 1912 (37 Stat., 240), plaintiff on November 22, 1913, filed its application in the Treasury Department praying the refund of said sum of \$8,300 through the Collector of Internal Revenue, located in the city of Baltimore, Md., who, in the regular course of his official business, certified the same to the Treasury Department for its con-

sideration. Its application was on the prescribed Internal Revenue form known as Form 46, revised November, 1907, and was in all respects complete, regular and in accordance with the law and regulations and supported by the evidence and powers required. It alleged as ground for refund that the taxes in question were assessed and collected on plaintiff's capital and surplus, which were not used or employed in the banking business within the meaning of Section 2 of said War Revenue Act. Notwithstanding the said application for refund was rejected by the Secretary of the Treasury on April 16, 1917, and the Department has never refunded and still refuses to refund to plaintiff the sums claimed as aforesaid (R. 63-70).

BRIEF.

I.

The measure of the Special Bankers' Tax is the amount of capital "used or employed" in the business of banking.

This proposition is submitted upon the arguments and authorities set forth in support of the first proposition of plaintiff's brief which we filed in this court on January 30, 1920, in the case of Union Trust Company of Indianapolis vs. United States, No. 33,978.

II.

Neither the plaintiff's capital nor surplus was appropriated to, used or employed, in the banking business during the taxing periods in question.

Although this proposition is stated in terms identical with those of the second proposition in our above-

mentioned brief, it is advisable briefly to point out the distinguishing features presented by the evidence disclosed in the present record.

The questions of law raised by the foregoing propositions have been presented to the courts for adjudication under varying circumstances. The Farmers Loan & Trust Company of New York so conducted its great trust business and its much smaller banking business that it was impossible to show such a physical segregation of the company's assets that the capital stock money could be actually pointed to as such. But as the company continuously kept invested in permanent investments assets of a value exceeding the amount of its outstanding capital stock it was found, as an ultimate fact, that the capital was not "used or employed" in the banking business (*Treat vs. Farmers Loan & Trust Co.*, 185 Fed., 760). This company was again before the court seeking to recover the special bankers' taxes collected from it under the Act of 1914. But, as Judge Hand pointed out, its banking powers and the varieties of banking business transacted had now greatly increased. In view of the facts disclosed, the court would not assume, until resort to positive proof had failed, that any specific assets of the company constituted capital. It thought that it was incumbent upon the trust company to show what proportion of its total *assets* was used or employed in transacting that part of its business defined as banking in the Act, and thereby show what proportion of the *capital* was thus used or employed. Consequently the case was remanded that the proof might be furnished (*Anderson vs. Farmers Loan & Trust Co.*, 241 Fed., 322).

Then the Real Estate Title & Trust Co. of Philadel-

phia and Title Guarantee & Trust Co. of Baltimore came before the courts. These companies transacted some banking business, but both in volume and importance it was relatively insignificant as compared with the principal trust and title insurance business transacted. But the banking business was *segregated* from the other businesses and none of the capital or surplus was used or employed in banking. In view of the decisions in New York and from the logic of the facts presented it followed *a fortiori* that recovery of the taxes should be permitted under such circumstances. And so Judge Rose held in the Baltimore case (Title Guarantee & Trust Co. vs. Miles, 258 Fed., 771). But Judge Dickinson, in Philadelphia, by a peculiar process of reasoning held as a matter of law that considering capital as a banking expression and not as an economic substance, it could not be ear-marked as such. In our brief in the Indianapolis case, No. 33,978, we attempted to show the fallacy underlying Judge Dickinson's argument, and our judgment has now been sustained by the Circuit Court of Appeals for the Third Circuit which recently reversed Judge Dickinson in the same case on appeal (Real Estate Title & Trust Co. vs. Lederer, — Fed., —).

Now the Real Estate Title & Trust Co., like the plaintiff here, was principally engaged in transacting business other than that of banking. Both companies maintained a complete segregation of assets, both as a physical fact and as a matter of bookkeeping. Neither company used or employed its capital in the business of banking. The facts of that case are practically identical with those of the instant case, though it is apparent that the relative importance of the banking business done by this plaintiff as compared with its other

businesses is much less than the relative importance of the banking business done by the Real Estate Title & Trust Company.

The record in this case shows such a complete segregation of assets, both as a physical fact and as a matter of bookkeeping, that we do not presume to take the time of the court by making an analysis of the evidence. Our requests for findings of fact, and the citations to the record in support thereof, plainly and sufficiently show, without further elucidation, that neither the capital nor surplus of this company was ever used or employed in the business of banking. This fact was so plainly apparent that it was acknowledged even by the Collector of Internal Revenue in 1898, who that year only taxed plaintiff on an assessment which assumed a nominal capital of \$25,000.

Under such circumstances as these must the plaintiff be subjected to the injustice that follows upon payment of a tax on capital that was never used in the banking business, but only in the vast bonding, surety and related businesses conducted by this surety company? The taxing act would be reduced to an absurdity were a construction adopted under which plaintiff company while paying a tax under Schedule "A" on every surety bond it executed was, for the purposes of Section 2, classified as a banker using its entire capital and surplus in the business of banking. The results we seek to avoid are very clearly indicated by Chief Justice Buffington in the Philadelphia case:

"As we have said, the plaintiff, Trust Company, by virtue of corporate powers thereto enabling it, is, besides banking, engaged in four other distinct businesses, first, insuring titles; second, executing trusts; third, safe deposit, and fourth,

real etate; and in carrying such title, trust, safe deposit and real estate businesses, the plaintiff does none of the several acts which the statute defines as constituting banking; that is to say, it does not receive deposits, make collections, loan money or discount or sell notes. From which it will appear that if the plaintiff company were only carrying on, first, its title insurance business; second, its trust business; third, its safe deposit, and, fourth, its real estate business, it would not be subject to tax under this Act as being engaged in the banking business. Such being the undoubted fact, does the further fact that plaintiff adds a fifth business, viz., that of banking, to its corporate acts, thereby subject to the taxing scope of this Act not only \$1 for each \$1,000 of capital used or employed in its banking business, but also for each \$1,000 capital employed (first) in its title business, (second) in its trust business, (third) in its safe deposit, and (fourth) in its real estate business. We think the statement of such proposition is of itself an answer to the contention."

Respectfully submitted,

LYON & LYON,
Attorneys for Plaintiff.

SETH SHEPARD,
H. ROZIER DULANY, JR.,
Of Counsel.

EXHIBIT "B."

FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

1897—December 31st.

SURETY DEPARTMENT.

RECEIPTS.

Cash received for premiums on Bonds (see Item 6, page 70, of the Record).....	\$783,365.24	
Interest and Dividends on Stocks and Bonds (see Item 9, page 70, of the Record).....	53,591.66	
Rents of Offices in Building (see Item 11, page 70, of the Record).....	39,266.65	
Total Income for Year		\$876,223.55

DISBURSEMENTS.

Total Disbursements (see page 71 of the Record)	\$642,364.21	
Deduct Dividends paid to Stockholders (see Item 4, page 71 of the Record)	80,000.00	
Total Expenses	\$562,364.21	
Net Profit of Surety Department for Year..	313,859.34	
		\$876,223.55

1898—June 30th.

SURETY DEPARTMENT.

RECEIPTS.

Cash received from Premiums on Bonds (see Item 6, page 76, of the Record).....	\$439,649.18	
Interest and Dividends on Stocks and Bonds (see page 76 of the Record).....	31,319.63	
Rents of Offices in Building (interest upon other debts due the Company) (see page 76 of the Record)	19,142.52	
Total Income for Period, January 1, 1898, to June 30, 1898		\$490,111.33

DISBURSEMENTS.

Total Disbursements (see page 77 of the Record)	\$468,196.92	
Deduct Dividends paid to Stockholders (see page 77 of the Record)	50,000.00	
Total Expenses	\$418,196.92	
Net Profit of Surety Department for Period January 1, 1898, to June 30, 1898.....	71,914.41	
		\$490,111.33

1899—December 31st.

SURETY DEPARTMENT.

RECEIPTS.

Cash Received from Premiums on Bonds (see Item 6, page 81, of the Record)	\$947,542.38
Interest and Dividends on Stocks and Bonds (see item 10, page 81, of the Record)	91,517.53
Rents of Offices in Building (see item 7, page 81, of the Record)	38,138.69
Total Income for Year	\$1,077,198.60

DISBURSEMENTS.

Total Disbursements (see page 8, of the Record)	\$960,331.65
Deduct Dividends paid to Stockholders (see Item 4, page 82, of the Record)	207,486.00
Total Expenses	\$752,845.65
Net Profit of Surety Department for Year..	\$324,352.95
	\$1,077,198.60

1900—December 31st.

SURETY DEPARTMENT.

RECEIPTS.

Cash Received for Premiums on Bonds (see page 88, of the Record)	\$1,138,262.47
Rents from Company's Building (see page 88, of the Record)	38,453.32
Interest and Dividends on Stocks and Bonds (see page 88, of the Record)	135,671.43
Total Income for the Year	\$1,312,387.22

DISBURSEMENTS.

Total Disbursements (see page 89 of the Record)	\$1,222,514.29
Deduct Dividends paid to Stockholders (see page 88, of the Record)	262,447.50
Total Expenses	\$960,066.79
Net Profit of Surety Department for Year..	352,320.43
	\$1,312,387.22

1901—December 31st.

SURETY DEPARTMENT.

RECEIPTS.

Cash received for premiums on bonds (see page 96, of the Record).....	\$1,206,058.81
Rents from Company's Building (see page 96, of the Record)	38,035.89
Interest and Dividends on Investments, Stocks and Bonds (see page 96, of the Record)..	145,363.43
Total Income for the Year.....	\$1,389,458.13

DISBURSEMENTS.

Total Disbursements (see page 97, of the Record)	\$1,343,841.29
Deduct Dividends paid to Stockholders (see page 97 of the Record)	244,963.25
Total Expenses	\$1,098,878.04
Net Profit of Surety Department for Year..	290,580.09
	<u>\$1,389,458.13</u>

1902—December 31st.

SURETY DEPARTMENT.

RECEIPTS.

Cash received from premiums on Bonds (see page 102, of the Record).....	\$1,227,994.24
Rents from Company's Building (see page 102, of the Record)	43,296.28
Interest on Stocks and Bonds (see page 102, of the Record)	175,845.90
Total Income for the Year.....	\$1,447,136.42

DISBURSEMENTS.

Total Disbursements (see page 103, of the Record).....	\$1,463,900.58
Deduct Dividends paid to Stockholders (see page 102, of the Record)	279,993.00
Total Expenses	\$1,183,907.58
Net Profit of Surety Department for Year..	263,228.84
	<u>\$1,447,136.42</u>

EXHIBIT "C."

FILED AUGUST 6, 1920.

COURT OF CLAIMS OF THE UNITED STATES.

No. 33,976.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,

VS.

THE UNITED STATES.

MOTION FOR A NEW TRIAL.

Now comes the Plaintiff, the Fidelity & Deposit Company of Maryland, by its attorneys, Lyon & Lyon, Esqs., and prays this Honorable Court to grant it a new trial from the judgment and order of dismissal made by the court herein, for the reason that errors in fact and errors in law were committed by this Honorable Court in arriving at its findings of fact and conclusions of law, filed in the above entitled case on the 7th day of June, 1920.

LYON & LYON,
Attorneys for Plaintiff.

SETH SHEPARD,
Counsel.

That specific errors in fact and errors in law will be set out in detail in Plaintiff's brief to be hereafter filed in support of this Motion for a New Trial.

LYON & LYON,
Attorneys for Plaintiff.

EXHIBIT "D."

FILED SEPTEMBER 24, 1920.

COURT OF CLAIMS OF THE UNITED STATES.

No. 33,976.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,

vs.

THE UNITED STATES.

SUPPLEMENT MOTION FOR NEW TRIAL.

Now comes the plaintiff, the Fidelity & Deposit Company of Maryland, by its attorneys, and files this supplement to its motion for new trial filed herein on the 6th day of August, 1920. When the said motion for new trial was filed the specific errors of fact and law complained against were not set forth, nor were specific amendments to the court's findings of fact requested. Plaintiff had been informed by the court and by the clerk of the court that no findings of fact had been filed in this case and hence plaintiff duly filed its request that the court make findings of fact and file the same herein. This request was taken under consideration by the court and on the last day on which under the rules the plaintiff was permitted to file motion for a new trial, the court informed the plaintiff that findings of fact had already been filed by the court in this case. Thereupon, the plaintiff immediately filed its motion for a new trial, but because of the shortness of time it was impossible to set forth specific errors, make specific requests and support the same with the reasons therefor. It is, therefore, requested that said motion for new trial be considered by the court in conjunction with the present supplement thereto.

Plaintiff, therefore, makes the following request for amendment of the findings of fact heretofore filed by the court in this case.

III.

Strike out the last sentence of the 2d paragraph which reads as follows:

“Some portion of this building was used or employed by the plaintiff in its banking business, but what proportion so used as compared with the other portions of the building used in other branches of the company’s business does not appear from the evidence.”

Substitute therefor the following:

A portion of this building was used or employed by the plaintiff in its banking business, but the building was carried as an asset of the Capital Stock Department, to which department the Banking Department paid rent for the building space used by the Banking Department in its operations.

REASON.

The portion of this finding above objected to conveys a false impression that would materially affect any conclusion of law drawn therefrom. The books of the company, introduced in evidence, disclose the rental value of the building space occupied by the banking department. The building, as shown by the evidence, was an asset of the Capital Stock, *i. e.*, the Surety Bond, department. The banking department paid an annual rental to the Surety Bond department for the former’s use of a portion of the building. This

item was regularly charged against and paid by the banking department as banking department expense. (R. 55, Re-X-Q. 258-262; R. 51, Re-X-Q. 220; R. 33, Q. 44-46, 41.)

The items were not read into their depositions by the witnesses, as the amount of space used and the specific sums paid are quite immaterial to the issues presented in this case. The material fact is the one proved,—viz., that the segregation between departments was as complete in respect to building space as in respect to investments, receipts, expenditures, etc. The portion of the Finding objected to conveys the opposite impression.

III.

Strike out the last paragraph of Finding III. This paragraph relates to the expenses incident to the conduct of the banking business and holds that the same were paid out of the same fund of account; that all similar expenses were paid by plaintiff in the conduct of all its business; that this fund was the undivided profits account, and that the proportion of banking expense to all other expenses does not appear.

REASON.

The paragraph objected to is not supported by any evidence. Furthermore it directly contradicts the court's Finding No. VII which correctly states the facts as proved by the evidence.

The expenses of the banking department were not paid out of the undivided profits accounts, nor for that matter were the expenses of the Surety Bond department paid out of that account. The actual moneys with which the expenses of each department were paid, were the liquid moneys of the company, carried partly

as the counter cash of each department. The banking department paid its own expenses, wages, salaries, interests to depositors, rent for office space, etc., out of its own receipts, and how much these were and what proportion they bore to the other expenses of the company was definitely proved and appears on the books placed in evidence.

At the end of each fiscal period the difference between the receipts of each department and the expenses of each department were entered in a lump sum as the net earnings of the respective departments, in the undivided profits account of the company. Out of the credit balance of this undivided profits account, dividends were paid at the end of the fiscal periods on the entire capital stock of the company irrespective of how much of the credit balance was earned by this or that department. In other words, the segregation of business was strictly maintained up to the point where such segregation was useful and served some purpose, *i. e.* up to the point where each department completed its function as a department and turned over the money it made to the general purposes of the whole business. As a result of this segregation, the directors knew at every moment of time just how much money each department was earning, how much it was costing to operate, what its credit balances were, etc., etc. (R. 48, Qs. 185-188; R. 51, Qs. 213-268, R. 60, Qs. 55-61.)

The paragraph in question and Finding VII can't both be right. And there is positively no evidence in the record to support the facts found in the paragraph objected to.

IV.

At the end of Finding IV add the following:

The income of the Capital Stock Department con-

sisted principally and almost exclusively of premiums earned on bonds executed by the company which, during the period in question, were as follows:

For the year ending:

Dec. 31, 1897	\$645,908.67
1898	858,975.71
1899	976,894.47
1900	1,135,321.65
1901	1,211,588.61

(Qs. 192-202, R. 48.)

REASON.

Without the disclosure of the above facts the Findings as a whole furnish no basis for a comparison of the business done by this department with that done by the banking department. The volume of business done by the banking department is quite clearly indicated by Finding V and for all that the Findings disclose this might be the principal business done by plaintiffs. It is material to the issues to show that the banking business was relatively insignificant as compared with the Surety Bond business, plaintiff's principal business.

VII.

At the end of the first paragraph of Finding VII add the following:

The segregated assets of any department were not used or employed by any other department in the conduct of the business of that other department. The income derived from the investment or use of the segregated assets of any department was not used or employed by any other department.

REASON.

It is submitted that since the Court has already found that the assets of each department were segregated it should carry such a finding to its logical conclusion and show whether or not the earnings from the investment of such assets were segregated also. The question at issue is whether or not the capital of the company was used or employed in the banking business, and this question cannot be determined until the court finds as a fact how the assets of the company were utilized. That the assets of the company were segregated is merely a preliminary conclusion of fact and the ultimate conclusion remains undetermined until the Court states what was done with those assets, after the segregation was made. The evidence indisputably shows that the segregation was carried through into the use made of those separate assets;—that the income derived from the use and employment of each kind of assets went to the credit of and was used and employed by the department which had exclusive control of the respective assets. (R. 35, Qs. 55-80; R. 39, Qs. 94-129; R. 47, Qs. 180-184; R. 49, Qs. 25-32; R. 59, Qs. 41-59.)

Respectfully submitted,

LYON & LYON,
Attorneys for Plaintiff.

AFFIDAVIT OF COUNSEL.

District of Columbia, ss:

Personally appeared before me, a Notary Public, in and for the aforesaid District of Columbia, Simon Lyon, who being duly sworn according to law states:

That he is a member of the firm of Lyon & Lyon, Attorneys in the Court of Claims for the Appellant herein, and assisted in preparing the pleadings therein, and he is familiar with the evidence taken in said cause.

That Exhibits "A," "C" and "D" are true copies of records filed in the Court of Claims and that Exhibit "B" is made from the record filed in the Court of Claims, specific reference being made to the pages of the record therein, Exhibit "B" being a true copy thereof.

That claimants motion for new trial was filed in the Court of Claims within the time prescribed by the rules of said Court and the supplemental motion was filed September 24, 1920, wherein reasons were given for the proper and further findings of said Court, reference being made to Exhibits "C" and "D" herein filed, and which motion was overruled on the 10th day of January, 1921, by the said Court of Claims.

SIMON LYON.

Subscribed and sworn to before me this 14th day of December, 1921.

(Seal)

GEORGE W. SMITH,
Notary Public.